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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1328

ANDREW CATAPANO CO., INC. and GROW CONSTRUCTION CO., INC., a Joint Venture, Comprising ANDREW CATAPANO CO., INC., GROW CONSTRUCTION CO., INC., and ALBERT COZZI,

Appellant,

v.

NEW YORK CITY FINANCE ADMINISTRATION,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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Preliminary Statement

The appellant has appealed from a final order and judgment of the Court of Appeals of the State of New York, unanimously affirming a judgment of the Appellate Division of the Supreme Court of that State. The

Appellate Division had reviewed and unanimously confirmed, without opinion, a determination of the Finance Administrator, (now the Commissioner of Finance) of the City of New York, issued after a hearing at which testimony was given and exhibits introduced into evidence.

The memorandum opinion of the Court of Appeals is officially reported in 40 N Y 2d 1074 and appears in the appendix of the appellant's jurisdictional statement at pages A1-A2. The opinion has not yet been published in the Northeastern reporter. The decision of the Appellate Division is reported in 50 A D 2d 725; 376 N.Y. Supp. 2d 776.

By this appeal the appellant challenges the validity under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution of

assessment of New York City Unincorporated Business Income Tax (hereafter referred to as the UBT) for the calendar years 1967 and 1968 in the amount of $74,075.32 ($56,973.43 tax; $17,101.89 interest). The appellant's primary contention seems to be that the State Enabling Act authorizing the New York City tax did not authorize the assessment in the appellant's circumstances, a contention which is essentially one of State law and which was rejected by the New York Court of Appeals. A second contention made by the appellant is that the requirement in the New York City local law imposing the tax, and in the State Enabling Act, that a taxpayer use the same method of accounting for City income tax purposes as it uses for Federal tax purposes denies it equal protection because it results in the appellant paying more tax than a contractor who had

elected to use a different accounting method.

Appellee moves to dismiss the appeal on the ground that it does not present a substantial federal question.

Statutes Involved

The local law of the City of New York imposing the tax in question is contained in Title S of Chapter 46 of the Administrative Code of the City of New York. Pertinent provisions thereof appear at pages 3 to 7 of the appellant's jurisdictional statement.

The State statute authorizing the City to impose the tax is Chapter 772 of the Laws of 1966 of the State of New York (§2). The opening paragraph of this Enabling Act appears at page 3 of appellant's jurisdictional statement, and requires that the terms of any local law adopted thereunder shall be in substantially the same terms as a model local law which it sets forth.

Section 121 of the model local law provides, in pertinent part, the following:

> "§121. Accounting periods and methods.
> (a) Accounting periods.-A taxpayer's taxable year under this title shall be the same as the taxpayer's taxable year for federal income tax purposes.
> (b) Accounting methods.-A taxpayer's method of accounting under this title shall be the same as the taxpayer's method of accounting for federal income tax purposes. In the absence of any method of accounting for federal income tax purposes, unincorporated business taxable income shall be computed under such method as in the opinion of the director of finance clearly reflects income.
> (c) Change of accounting period or method.- (1) If a taxpayer's taxable year or method of accounting is changed for federal income tax purposes, the taxable year or method of accounting for purposes of this title shall be similarly changed.
>
> * * * *

The same provisions are contained in Section S46-17.0 of the local law imposing the tax.

Statement of the Case

Until 1966, the City of New York imposed a General Business Tax for the privilege of

doing business within the City measured by gross receipts received during each calendar year. Beginning in 1966, the City imposed a new and different tax, the UBT, on the net income of unincorporated businesses carried on within the City.

The appellant, a joint venture engaged in the performance of a long-term construction contract, was an unincorporated business subject to the UBT. Appellant had, prior to 1966, paid a gross receipts tax on the progress payments received for construction which was completed in 1967, with final payment received in 1968.

The UBT taxes net income calculated, with certain modifications, in the manner in which it was required to be calculated for Federal income tax purposes. The Federal law permits contractors like the appellant to report its income on the usual

cash or accrual basis or on either a "percentage of completion" basis or on a "completed contract" basis, depending upon the method of accounting it employs in keeping its books and records. The UBT, and the State legislation authorizing the tax, require that a taxpayer's method of accounting shall be the same as its method of accounting for Federal income tax purposes. The appellant kept its books and records on a completed contract basis so that it reported no Federal income until its contract was completed in 1967 and 1968, at which time it reported that income on the completed contract method. Among the gross receipts which were included in calculating that Federal net income were receipts received during years preceding 1966 which were used to measure the former City gross receipts tax.

The basic question in this Court is whether the petitioner is entitled, under the Due Process and Equal Protection Clauses of the Federal Constitution, to diminution of the UBT for the years in which its contract was finally completed, and Federal income reported, because that income was derived in some measure from the gross receipts received by it as progress payments during 1963, 1964 and 1965, and used as a measure of its gross receipts tax paid to the City for the privilege of doing business in the City during those earlier years, where neither the UBT law, its Enabling Act, nor any other New York law provides for such special treatment.

ARGUMENT

THE CLAIM THAT THE ASSESSMENT VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

(1)

Appellant's due process argument (Point I of its Jurisdictional Statement at pp. 15-21) is that the City of New York lacked the power under certain statutes of the State of New York to tax the net income in question, and that imposition of the tax without authority constituted a deprivation of property without due process of law.

However, the New York Court of Appeals in deciding this matter held that the tax was authorized by State statute (40 NY 2d at p. 1076). Such construction of a State statute by the State's highest court is binding in the Federal courts. Gurley v.

Rhoden, 421 U.S. 200, 210 (1975); International Harvester Co. v. Dept. of Taxation; 322 U.S. 435, 445 (1944); General Trading Co. v. Tax Comm'n., 322 U.S. 335, 337 (1944); Hebert v. Louisiana, 272 U.S. 312, 316 (1926).

Indeed, there was little room for construction as the State statute authorizing the tax (L. 1966, Ch. 772, §2) required that the City tax be imposed in the form in which it was imposed, and Section 1231 of the State Tax Law, relied upon by the appellant, is a section in a different tax enabling act expressly restricted in its application to taxes imposed under that enabling act and, by its terms, having nothing to do with net income taxes.

(2)

The appellant's equal protection arguments (Points II and III of its Jurisdictional

Statement at pp. 21-34) are also without merit.

Certainly, there is a rational basis for requiring that the same method of accounting be used for the City UBT as for the Federal income tax. Such a provision is of enormous help to the City taxing authorities because, coupled with the requirements for reporting on the basis of Federal net income, with certain modifications (N.Y.C. Admin. Code, §§S46-4.0, S46-5.0, S46-6.0), it enables them to rely to a great extent on Federal examinations and determinations, instead of undertaking an extensive program of enforcement and audit themselves. See Peo. ex rel. Hazzard v. Gilchrist, 220 App. Div. 362 (3d Dept., 1927). The Federal government, with a far greater amount of income tax at stake than either the City

or the State and far greater examining resources, is a primary and vital source of information for both City and State.

Of the numerous cases upholding various tax classifications and showing the wide scope of classification permissible in the exercise of the taxing power, a number hold that inconvenience or difficulty in administering or collecting a tax will alone justify differing tax treatment of objects and situations which are essentially alike.

The first Supreme Court case clearly indicating that the equal protection clause acted as a limitation on state taxes, Bell's Gap Railroad Co. v. Pennsylvania, 134 U.S. 232 (1890), upheld the tax involved for reasons which can only be ascribed to administrative difficulties. The case upheld an annual

ad valorem tax which taxed corporate bonds at their nominal or face value - obviously an arbitrary value, but easy to determine administratively - and which, at the same time, taxed stocks and all other securities at their actual value.

Hatch v. Reardon, 204 U.S. 152 (1907), aff'g 184 N.Y. 431 (1906), a holding very similar to Bell's Gap, involved a New York stamp tax on sales of stocks which exempted sales of bonds. Justice HOLMES pointed out that stocks had to be registered on the corporation's books while bonds could be transferred by delivery and that, if the tax were to be extended to bonds, it would be extremely difficult to discover the transactions, and hence difficult to enforce.

Other examples of this principle are to be found in Citizens' Telephone Co. v.

Fuller, 229 U.S. 322 (1913), upholding a tax on telephone companies but exempting small rural telephone exchanges because the cost of collection would be "disproportionate" to the tax yield (ibid. at p. 332); Continental Baking Co. v. Woodring, 286 U.S. 352, 370 (1932), which upheld for similar reasons a license tax, measured by gross-ton mileage traveled on state highways, even though it exempted local merchants whose operations entailed a minimal use of state (as distinguished from local) highways; Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526 (1895), upholding a law limiting recovery of delinquent taxes to those on real property, on the ground that chattels changed hands and location so frequently that enforcement would be too costly; and Merchants' Bank v. Pennsylvania, 167 U.S.

461 (1897), upholding a statute which taxed the stock of banks at 8 mills per dollar of par value when paid by the bank for its stockholders, and at 4 mills per dollar of actual value when paid by the stockholders, the par value basis resulting in a lower tax when a bank had a large surplus, because collection from the bank made for more efficient and less expensive administration.

In Carmichael v. Southern Coal Co., 301 U.S. 495 (1937), Justice STONE said (p. 511):

> "Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others* * * We cannot say that the expense and inconvenience of collecting the tax from small employers would not be disproportionate to the revenue obtained. For it cannot be assumed that the legislature could not rightly have concluded that

> generally the number of employees bears a relationship to the size of the payroll and therefore to the amount of the tax, and that the large number of small employers and the paucity of their records of employment would entail greater inconvenience in the collection and verification of the tax than in the case of larger employers."

Some of the laws considered in these cases deal with situations that present collection or administration problems by exempting or excluding them from taxation. Others, however, solve the administrative problem by using an arbitrary base (par value) or by increasing the base or tax rate. The leading case of the latter type is Madden v. Kentucky, 309 U.S. 83 (1940). There this Court upheld an annual ad valorem tax which treated bank deposits in Kentucky banks more favorably than those in banks located outside the state (a tax of ten cents per hundred dollars on Kentucky de-

posits; one of fifty cents per hundred dollars out-of-state deposits). The Court adverted to the higher costs of investigation in ascertaining out-of-state deposits, saying (309 U.S. at p. 90):

> "The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection." (Italics supplied.)

The cases dealing with administrative costs and difficulties do not require that the reasons relied on to sustain different tax treatment be shown to be the actual reasons contemplated by the legislators. In testing the validity of a law under equal protection, any basis which a legislative body could have reasonably concluded to be a sound one is adequate. The burden of the per-

son attacking the law is "to negative every conceivable basis which might support it." Madden v. Kentucky, 309 U.S. 83, 88 (1940). Thus, in Rast v. Van Deman & Lewis, 240 U.S. 342 (1916), the Court said (at p. 357):

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety."

See, also, Carmichael v. Southern Coal Co., 301 US. 495, 509-510 (1937); Southwestern Oil Co. v. Texas, 217 U.S. 114, 126 (1910).

(3)

Moreover, although the appellant's election of the completed contract method of accounting in this case resulted in its owing a greater City UBT, if the contract had been completed at a loss, such election could have resulted in a tax saving for the appellant or its members.

(4)

The appellant's statement that in passing the Enabling Act the Legislature stipulated that the City of New York follow the State Unincorporated Business Income Tax as a model (Juris. Statement, p. 22) is inaccurate. While the State Unincorporated Business Income Tax was a model for the City tax, the Legislature in enacting the Enabling Act with its model local law, utilized some provisions of the State tax, but not others.

The transitional provision in Section 705(c) of the Tax Law was one of those provisions deliberately omitted from the Enabling Act for the City tax. This provision of the State tax was utilized when the State replaced its former net income tax on unincorporated businesses with a similar net income tax which incorporated by reference provisions of the Internal Revenue Code. The new State tax was essentially a continuation of the former State tax. The City Unincorporated Business Income Tax, however, replaces an entirely different kind of tax, one based on gross receipts, and the transitional provision would have been inappropriate.

At any rate, the fact that another tax law has transitional provisions while the tax law in question does not, does

not raise an equal protection issue.

Conclusion

The appeal from the order and judgment of the Court of Appeals of the State of New York should be dismissed.

April 20, 1977

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